United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR, Complainant, v. MIDWEST GENERATION, LLC, and its successors, Respondent.	OSHRC DOCKET NO. 00-1362

APPEARANCES:

For the Complainant:
Robert E. Mann, Esq., Franczek Sullivan PC, Chicago, Illinois

For the Respondent:
Ruben R. Chapa, Esq., Barbara Goldberg, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Midwest Generation, LLC, and its successors (Midwest), at all times relevant to this action maintained a place of business at Midwest's fossil fuel power plant at 1800 Channahon Road, Joliet, Illinois. On December 22, 1999, Midwest was involved in hoisting materials for the erection of a platform and associated scaffolding, when an accident resulted in the death of one of its employees. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

Following the accident on December 22, 1999, the Occupational Safety and Health Administration (OSHA) began an inspection of Midwest's Joliet plant. As a result of that inspection, OSHA issued citations to Midwest alleging violations of the Act, and proposing civil penalties. By filing a timely notice of contest Midwest brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

The original citations in this matter were issued under the general duty clause, §5(a)(1) of the Act, and under Part 1926, which pertains to construction. In its answer, Midwest denied the

applicability of the cited standards, maintaining that it was not in the construction industry. On February 14, 2001, this judge granted Complainant's motion to amend the citations; Complainant was given leave to allege, in the alternative, violations of the general industry standards at Part 1910.

On March 6-7, 2001, a hearing was held in Chicago, Illinois. At the hearing, Midwest withdrew any contention that its employees were not engaged in construction (Tr. 327). The parties have submitted briefs on the issues cited under Part 1926, noting that the alternative charges under Part 1910 are now moot (Complainant's Post-Hearing Brief, p. 2). Also at the hearing, Complainant moved to amend willful citation 2, item 2 to delete allegations relating to the provision of radios to all affected employees (Tr. 326). The amendment to citation 2, item 2 was approved in this judge's Order of April 12, 2001, and is reflected in the text below.

Facts

Lennard Coleman, Midwest's corporate vice president, testified that Midwest acquired its Joliet plant from Commonwealth Edison of Illinois (ComEd) on December 15, 1999, seven days prior to the OSHA inspection (Tr. 346). According to Mr. Coleman, during its pre-purchase inspection of the ComEd plant, Midwest discovered that the plant contained seamed reheat piping. Coleman stated that seamed piping, which was commonly used during the 1960s, has since been found to be hazardous. Defects in the seam welding have resulted in catastrophic failure of such piping in certain instances (Tr. 350-54). In conjunction with its purchase of the ComEd plant, therefore, Midwest arranged for a contractor, BMW, to replace seamed reheat piping in the plant (Tr. 354). BMW, in turn, entered into a subcontract with United Goedecke to perform portions of the required work (Tr. 355).

William Hibler, Midwest's maintenance planner, had in excess of 23 years experience with ComEd (Tr. 284). Hibler was the maintenance planner with ComEd for six years prior to Midwest's acquisition of the plant (Tr. 283-84). As maintenance planner, Hibler acts as liaison between the construction and maintenance crews, planning outages and assigning workers as needed (Tr. 284-85). Hibler testified that he was aware that the reheat pipes were being changed out; his role in the project was to assign Midwest employees to run the "chugger" for United Goedecke (Tr. 287-88, 292-93). Goedecke needed the chugger, a pneumatic winch, to lift 25' wooden I-joists from the ground to the eighth floor, where they were going to be used to construct scaffolding around a boiler (Tr. 31, 34, 43-44, 60, 64, 169, 272). The chugger, belonged to Midwest; Midwest's policy was to allow only its own employees to operate its equipment (Tr. 310). On December 21, 1999, Hibler called Mike Marunde, supervisor of the predictive maintenance department [PDM](Tr. 190-91), and told him that he needed someone from his crew to run the chugger (Tr. 215-16, 295). Goedecke, however, was not ready to

used the chugger until the following day, December 22 (Tr. , 245). When Hibler called the PDM that morning, Eugene Jagodzinski, an A-mechanic with the PDM group answered (Tr. 256, 268, 288-89). Jagodzinski agreed to meet with United Goedecke to see what assistance they needed (Tr. 217, 295).

Jagodzinski has been an A-mechanic in mechanical maintenance for 22 years (Tr. 265). Jagodzinski testified that it was customary for the mechanics to run equipment, such as fork lifts and cranes, for outside contractors (Tr. 268). He has run the chugger approximately a dozen times in the past (Tr. 274). Jagodzinski stated that after he got the call from Hibler, he and two other mechanics with the PDM group, Anthony Panega, an A-mechanic/welder with 21 years experience, and Mike Ready decided to work together on the job (Tr. 269, 314). The three stopped by the maintenance shop to pick up radios and to ask Hibler's permission to work together assisting United Goedecke (Tr. 270).

Hibler approved the participation of all three employees on the job: one to work on the eighth floor; one to run the chugger; and one to act as signal man from the ground floor (Tr. 271, 307). Hibler stated that he trusted Jagodzinski's assessment of the job, and that it was common for Midwest to use its own employees as signal men (Tr. 308).

Jagodzinski and Ready went on to meet with Goedecke's personnel, while Panega went up to the eighth floor (Tr. 257, 271-72, 315). Goedecke's representative told Ready and Jagodzinski that they were going to be lifting wooden I-joists up the chugger bay, *i.e.* the open area measuring approximately 10 by 12 feet located between 71 and 72 boiler, to the eighth floor (Tr. 33, 257-58; Exh. C-28). Ready was to work on the ground (Tr. 36). Panega would act as the radio signal man on the eighth floor, relaying instructions to Ready on the ground floor (Tr. 37-38, 315). Jagodzinski would run the chugger from its platform on the second floor (Tr. 34, 256).

In lifting the joists, Ready, and/or a Goedecke employee on the ground floor attached a sling to a joist using a choker hitch (Tr. 36, 159, 258, 316; Exh. C-24). [To rig a choker hitch, the rigger wraps the sling around the object to be lifted, in this case, an I-joist, and then threads one end of the sling through a loop sewed into the end of the sling; the sling forms a noose around the joist (Tr. 105, 316; Exh. C-22). The loop in the other end of the sling is then attached to the chugger's hook and tackle (Tr. 39, 258; Exh. C-25).] When Panega radioed Ready to send a load up, Ready signaled Jagodzinski with his hands, and Jagodzinski raised the I-joist until it hung vertically from the choker down the chugger bay (Tr. 259, 316). Ready then signaled Jagodzinski to stop the chugger so that a 25 foot tag line could be attached to the joist (Tr. 259). When Ready gave him the signal, Jagodzinski resumed winching the joist up (Tr. 45, 259, 316). Ready watched the joist go up (Tr. 207-08). When Panega radioed Ready to stop, Ready would go into the chugger bay, where he could been seen by the winch

operator, and signal him in turn (Tr. 45, 187 259, 316). Two Goedecke employees on the eighth floor would snag the I-joist and pull it on to the eighth floor landing (Tr. 45, 187). The chugger's hook and tackle were then lowered for the next joist, which had, in the interim, been cinched into a second sling (Tr. 35-36, 260).

After seven or eight joists were successfully hoisted in this manner, the last joist slipped out of the choke and fell down the chugger bay, striking Mike Ready and killing him (Tr. 41, 50, 317).

Alleged Violation of §1926.251 *et seq.*

Serious citation 1, item 1 alleges:

29 CFR 1926.251(a)(6): Each day before being used, the sling(s) and all fastening(s) were not inspected for damage or defects by a competent person designated by the employer:

> a. On or about December 22, 1999, at the chugger/winch/drum hoist between number 71 and number 72 boilers, two nylon slings used to lift I-joists (25 feet) were not inspected before they were used.

Serious citation 1, item 2 alleges:

29 CFR 1926.251(e)(1)(ii): Synthetic web sling(s) were not marked or coded to show the sling's rated capacities for the type of hitch used:

> a. On or about December 22, 1999, at the chugger/winch/drum hoist between number 71 and number 72 boilers, two nylon slings used to lift I-joists did not have rated capacities or type of material marked or affixed to them.

Serious citation 1, item 3 alleges:

29 CFR 1926.251(e)(8)(iii): Synthetic web sling(s) were not immediately removed from service when snags, punctures, tears, or cuts were evident:

> a. On or about December 22, 1999, at a chugger/winch/drum hoist, a torn nylon web sling used to lift I-Joists had not been removed from service.

Facts

United Goedecke provided the two cited synthetic web slings, which were 14 and 20 feet long respectively (Tr. 35, 62). It is undisputed that the cited slings were not marked with their rated capacities (Tr. 47, 87). Visible tears were apparent in one of the slings in use on December 22, 1999 (Tr. 45-46; C-22).

Midwest admits that no one from Midwest inspected the slings, unless one of the hourly employees took it upon himself to perform the inspection (Tr. 47). Mr. Hibler did not know whether

the slings were inspected; but testified that, generally, Midwest does not inspect other contractor's equipment (Tr. 298). Neither Mr. Panega nor Mr. Jagodzinski inspected the slings before using them in conjunction with the pneumatic winch (Tr. 61, 68). OSHA Compliance Officer (CO) Leroy Ratliff was unable to determine whether Mr. Ready inspected the slings (Tr. 171).

Midwest's written safety program includes a provision requiring the inspection of its own slings prior to each use (Tr. 7-74; Exh. C-11, C-19-p.71).

Discussion

Serious citation 1, item 1: Section 1926.251(a)(6) requires:

> (6) *Inspections*. Each day before being used, the sling and all fastenings and attachments shall be inspected for damage or defects by a competent person designated by the employer. Additional inspections shall be performed during sling use, where service conditions warrant. Damaged or defective slings shall be immediately removed from service.

Midwest admits that it failed to designate a competent person to inspect the slings that were to be used in the hoisting operation that took place at Midwest's plant on December 22, 1999. Though, in its brief, Midwest argues that Mike Ready was competent to perform the required inspection, and may have taken it upon himself to inspect the slings (Respondent's Post Hearing Brief, p. 11), the standard requires that employers using slings actually ensure that such inspections take place, by designating an employee who will be responsible for examining the slings. This Midwest did not do.

Midwest argues that it did not need to perform its own inspection, because it was entitled to rely on the inspection performed by the owner of the slings, United Goedecke. This argument must fail.

An employer has a duty to exercise reasonable diligence in detecting and preventing unsafe conditions to which its own employees may be exposed. *See, e.g., Lee Roy Westbrook Const. Co., Inc.,* 13 BNA OSHC 2104, 1989 CCH OSHD ¶28,465 (No. 85-601, 1989). In this case, Midwest owned the winch being used in the lifting operation; Midwest's employees were engaged in the common undertaking with United Goedecke; Midwest had its own safety procedures associated with the use of the winch and related components, specifically slings. Midwest clearly had sufficient expertise in, and control over the working conditions to conduct the required inspection, and avoid the use of unsafe slings.

It is true that an employer may, in some cases, rely on the assurances of a subcontractor that the subcontractor will perform its work safely, and that the employer need not duplicate safety efforts taken by the subcontractor. *See; Sasser Electric and Manufacturing Co.,* 11 BNA OSHC 2133 (No. 82-178,

1994); *Blount Intl. Ltd. (Blount),* 15 BNA OSHC 1897, 1991-93 CCH OSHD ¶29,854 (No. 89-1394, 1992). An employer may not, however, assume a subcontractor has taken required safety precautions without reasonable inquiry. *Blount, supra.* In this case, Midwest neither sought, nor received assurances about the safety of United Goedecke's equipment. Midwest's representative, Hibler, admitted that he had no idea whether the slings had been inspected prior to their use on December 22.

Because Midwest did not make reasonable inquiries into United Goedecke's safety precautions, or alternatively, fulfill its duty to protect its employees by exercising its own control over the work conditions, the cited violation is affirmed.

Serious citation 1, item 2: Section 1926.251(e)(1)(ii) provides:

> (e) *Synthetic webbing (nylon, polyester, and polypropylene).* (1) The employer shall have each synthetic web sling marked or coded to show. . . (ii) Rated capacities for the type of hitch.

Serious citation 1, item 3: Section 1926.251(e)(8)(iii) provides:

> (8) *Removal from service.* Synthetic web slings shall be immediately removed from service if any of the following conditions are present.. . . (iii) Snags, punctures, tears or cuts;. . ..

For the reasons discussed under item 1, above, items 2 and 3 are also affirmed.

Penalty

A separate penalty of $2,250.00 was proposed for each of cited violations.

It is well settled that the Commission has wide discretion in the assessment of penalties. The Commission has found that it is appropriate to assess a single penalty for distinct but potentially overlapping violations, and has done so in the past. *See; Miniature Nut and Screw Corp.*, 17 BNA OSHC 1557, 1996 CCH OSHD ¶30,986 (No. 93-2535, 1996), and cases cited therein. These three violations arose because Midwest's maintenance planner assigned Midwest employees to work with United Goedecke without inquiring whether those employees would be using any of Goedecke's equipment and investigating the safety of any such equipment. The defects cited at items 2 and 3 were readily apparent and would have been discovered by the inspection required under the standard cited at item 1. Because of the close relationship of the cited violations, this judge believes that the three items involving the slings should be combined for purposes of assessing a penalty.

CO Ratliff testified that the violations were "serious," in that if one of the cited slings had failed, causing a load to fall, the likely result would have been death or serious physical harm (Tr. 75, 92, 100). Midwest is a large company, employing more than 1,500 employees nationwide (Tr. 83). CO

Ratliff testified that Midwest received a 10% reduction in the proposed penalties for history, as it had not received any citations within the past three years. Because a "willful" violation was alleged at the same time as the three items at citation 1, no adjustment was made for good faith (Tr. 83).

The cited conditions were properly cited as serious. The gravity of the violation, however, was overstated. Though two employees were exposed to the cited hazard for approximately an hour (Tr. 85, 91, 98), CO Ratliff admitted that the probability of an accident occurring as a result of the violations was small (Tr. 75, 98). Because the I-joists being hoisted weighed only about 100 pounds, the weight of the joists did not exceed even the damaged sling's capacity (Tr. 60, 93-94). This judge finds that the cited violations resulted only in a potential hazard, *i.e.,* there was no danger of them failing because their capacity was exceeded while lifting a load of only 100 pounds, as they were on December 22, 1999. The gravity of the violation, therefore, is extremely low. Moreover, I find that Midwest should have been given credit for good faith, since, as discussed below, none of the alleged violations was shown to be willful.

Where the low gravity of a violation is the overriding factor, a penalty of as little as $100.00 has been deemed appropriate for a "serious" violation. *Flintco, Inc.,* 16 BNA OSHC 1404, 1993-95 CCH OSHD ¶30,227 (No. 92-1396, 1993); *Orion Construction, Inc.*, 18 BNA OSHC 1867; 1999 CCH OSHD ¶31,896 (No. 98-2014, 1999). A single penalty of $100.00 will be assessed for citation 1, items 1, 2 and 3.

Alleged Violation of §5(a)(1)

Willful citation 2, item 1 alleges:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to:

> a. On or about December 22, 1999, at the chugger/winch/drum hoist area between boilers numbers 71 and numbers 72, wooden I-Joists (approximately 25 feet long) were lifted from the ground level to the eighth floor in an unsafe manner in that one nylon web sling in a choker hitch configuration was used instead of two slings to lift the I-Joists which were unbalanced horizontal loads. Employees were thereby exposed to injuries associated with falling loads.

Among other methods, feasible methods to correct these hazards are: 1. Use two slings when horizontal loads such as I-Joists are hoisted.

Facts

It is undisputed that a single nylon sling in a choker hitch was used to hoist the cited I-joists.

Complainant maintains that Midwest had actual knowledge that the single nylon choker constituted a hazard. Complainant introduces ComEd's Safety Rule Book, which was retained by Midwest, and which states at **G-121.03.4 Rigging Loads**: "At least two slings must be used, each terminating at the lifting hook and at the load, when hoisting horizontal loads such as bars, beams, etc." (Tr. 101-02; Exh. C-19, p. 72). In addition, Complainant relies on the testimony of Michael Marunde. Marunde testified that when he learned that his crew had been reassigned to assist United Goedecke on December 22, he went to the chugger bay to ask how long the men would be unavailable (Tr. 206). After speaking briefly to Mike Ready, Marunde looked up at the suspended load, which hung vertically from a single sling in the chugger bay (Tr. 207, 221, 243, 248). Marunde testified that he had some concerns about the load at the time (Tr. 223). Marunde stated that the joist did not seem secure to him (Tr. 242). Marunde, however, had no training in load rigging, whereas he three men working with Goedecke were trained to rig the winch, and routinely ran the winch. Marunde assumed that the members of the hoisting crew knew what they were doing (Tr. 231, 244, 248, 250).

To show industry recognition, Complainant introduced Exhibit 49, a booklet on **Rigging Procedures** put out by the United Brotherhood of Carpenters Apprenticeship and Training Fund of North America. The booklet notes that a single choker hitch "does not provide full 360° contact with the material. Therefore, do not use this hitch on loose material or loads that may slip out of the hitch" (Exh. C-49, p. 1-14). Another industry publication, **Bob's Rigging & Crane Handbook**, states that the single choker hitch forms a noose in the rope that tightens as the load is lifted. . .and should not be used to lift loose bundles from which material can fall or loads that are difficult to balance (Exh. C-51, p. 150). Finally, Complainant relies on a drawing in a handbook called **Scaffolding Introduction**, in which a stick figure is depicted hoisting a beam or pole by hand (Tr. 115; Exh. C-50, p.6-28). The beam is attached at a single point, and is labeled ROPE ATTACHED IN WRONG PLACE. (Exh. C-50, fig. 6-20). A second drawing shows the stick figure hoisting a beam with the ROPE ATTACHED PROPERLY. In that drawing the hoisting rope is attached to the beam or pole at one end; the rope is run down the length of the load and attached a second time near the other end (Exh. C-50, fig. 6-20).

CO Ratliff acknowledged that obstructions in the chugger bay prevented the hoisting crew from using two slings of equal length to lift the I-joists horizontally, and that because of the space limitations the I-joists had to be lifted in a vertical manner (Tr. 104-05). Nonetheless, CO Ratliff testified that the hoisting crew could have doubled the sling and still had two attachment points, or used two slings of different lengths to ensure that the joist did not slip out of the hitch (Tr. 117).

Discussion

In order to prove a violation of section 5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee; (2) the hazard was either actually recognized by the employer, or generally recognized by the employer's industry; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *See, Pelron Corporation*, 12 BNA OSHC 1833, 1986 CCH OSHD ¶27,605 (No. 82-388, 1986); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992).

In this case, Complainant did not establish that Midwest's use of a single nylon web sling in a choker hitch configuration was recognized as a hazard, either by Midwest in particular, or the construction industry in general. Complainant further failed to show that the use of two slings was a "feasible" means of eliminating or materially reducing the hazard.

As a threshold matter, this judge finds that Midwest's safety rule requiring two slings for hoisting horizontal loads is irrelevant to any determination of Midwest's recognition of a hazard in this case. Midwest's safety handbook sets forth a safe standard operating procedure for hoisting bars and/or beams in a horizontal fashion. The record establishes that because of obstructions in the chugger bay, there was no way to lift a joist as a balanced horizontal load. Where standard operating procedures are infeasible, the general duty clause does not bar an employer from using alternative means to accomplish its work, unless the employer *knows* the alternative means are likely to cause death or serious physical harm.

The alternative means chosen in this case was a single choker hitch. The record establishes that the single choker hitch is a recognized means of rigging some loads for hoisting. The winch operator, Eugene Jagodzinski believed that the choker hitch was a safe method of lifting the joist (Tr. 267). Jagodzinski testified that he had previously been involved in a similar operation, in which a single sling was used to lower planks inside a condenser (Tr. 263). In that case the planks were lowered in a vertical manner without incident (Tr. 263). Michael Marunde had no experience with the chugger/winch, and knew nothing about rigging. He was not involved in the hoisting operation, and his assumption that the A-mechanics and the Goedecke were performing their work safely was not unreasonable. Marunde's passing thoughts about the safety of the rigging are insufficient to establish that Midwest's actually knew that the single choker hitch was an unsafe method of hoisting I-joists. Complainant has not shown that the cited hazard was actually recognized by Midwest.

In retrospect, it is clear that the rigging method used in the cited circumstances was inadequate. However, based on the materials presented at the hearing this judge cannot determine whether, prior to this accident, the construction industry recognized that the use of a single choker hitch under those conditions was hazardous. The documentary evidence is, at best, ambiguous. The industry literature introduced by Complainant warns against use of the hitch for loose loads, loads "that may slip out of the hitch," or "loads that are difficult to balance." Those terms are not defined, however, and it is not clear from the examples provided, *i.e.,* long loose bundles, circular pipes (Exh. C-51, p. 150), whether a single choker hitch can safely be used to vertically hoist an irregularly shaped I-joist. Nor can this judge rely on the testimony of CO Ratliff to establish industry practice. Ratliff, an industrial hygienist with a degree in chemistry (Tr. 24-25), was not shown to have any expertise in construction or rigging. Moreover, Ratliff's abatement suggestions were at odds with the very materials the Secretary introduced to prove hazard recognition, as discussed below. This judge accords Ratliff's testimony little weight. The Secretary has not shown that the cited hazard was generally recognized in the construction industry.

Finally, Complainant failed to show that the use of two slings was "feasible," *i.e.,* was a safety measure recognized by "knowledgeable persons familiar with the industry" as necessary under the particular circumstances that existed at Midwest's work site. *See, Cerro Metal Products Division, Marmon Group, Inc.*12 BNA OSHC 1821, 1986 CCH OSHD ¶27,579 (No. 78-5159, 1986).

As noted above, CO Ratliff was not shown to have any particular expertise in construction in general, or in rigging in particular; nonetheless, he was Complainant's only witness in this matter. Ratliff agreed that two slings of equal length could not have been used in the chugger bay, but suggested that Midwest could have doubled the sling and attached both ends to the joist. This procedure would have required Midwest to run the sling over the winch hook. Alternatively, Ratliff suggested the crew use two slings of different lengths. According to Ratliff, either scenario would provide two attachment points, but allow the joist to be lifted vertically. Complainant's documentary evidence, however, specifically warns against or flatly prohibits the alternative means advocated by CO Ratliff. Midwest's safety rules prohibit lifting a beam or bar using a single sling attached at two points and "riding" over the hook (Exh. C-19, p. 72). **Rigging Procedures** states in a "**Safety Note:** Choker hitches that form an angle of less than 45° are not recommended (Exh. C-49, p. 1-15). **Bob's Rigging & Crane Handbook**, cautions that if the double choker hitch is appropriate only if the supporting legs are equal in length. (Exh. C-51, p. 150).

The sole instance in which Complainant's materials show a long object being correctly hoisted in a vertical fashion involves a pipe or bar, lifted manually and secured with a single rope tied off in two places. That diagram is found in a **Scaffolding Introduction** handbook (Tr. 115; Exh. C-50, fig. 6-20, p.6-28). Complainant introduced no testimony from which this judge might conclude that fig. 6-20 is recognized as applicable to mechanical hoisting, or constitutes a feasible alternative to the single choker hitch when using a winch and nylon web slings to lift beams or joists.

The occurrence of the December 22 accident, which is the subject of this matter, shows that Midwest's hoisting operation was, in fact, hazardous. The Secretary, however, failed to carry her burden of proof in regard to the allegations contained in citation 2, item 1. Complainant showed neither that the cited hazard was recognized as that term is defined in the case law, nor that the means of abatement set forth were recognized in Midwest's industry as necessary safety precautions. Accordingly, citation 2, item 1 must be vacated.

Alleged Violation of §1926.553(a)(4)

On April 12, 2001, this judge granted Complainant's motion to amend willful citation 2, item 2. As amended, the citation alleges:

29 CFR 1926.553(a)(4): All base-mounted drum hoists in use did not meet the applicable requirements for design, construction, installation, testing, inspection, maintenance, and operations, as prescribed by the manufacturer:

> a. At a chugger/winch/drum hoist between number 71 and number 72 boilers- On or about December 22, 1999, the winch operator responsible for lifting I-Joists (25 feet) from the ground floor to the eighth floor did not follow the instructions and meet the requirements as prescribed by the manufacturer, in that the winch had not been inspected prior to being used, the operator lifted loads without having a thorough understanding of the proper methods for hitching loads, and loads were carried over people including the winch operator. Employees were thereby exposed to injuries associated with falling loads.
>
> The cited standard provides:
>
> All base mounted drum hoists in use shall meet the applicable requirements for design, construction, installation, testing, inspection, maintenance, and operations, as prescribed by the manufacturer.

Discussion

Winch had not been inspected prior to being used. The Parts Bulletin from the manufacturer, Ingersol Rand, establishes the required inspection, maintenance, and operating procedures for the chugger (Exh. C-12). The manual states that "[r]egular inspection procedures

should be set up, rigidly adhered to and recorded by or under direction of a qualified person" (Exh. C-12, p. 1).

CO Ratliff testified that Midwest's records showed that the cited chugger/winch had last been sent out for inspection in 1995 (Tr. 132). Midwest's maintenance planner, Hibler, confirmed Ratliff's testimony; because the winch wasn't used very often, it was sent out, rather than being inspected in house. The last inspection was in 1995 (Tr. 299). Upon his inspection of the winch, CO Ratliff found no defects other than an improperly loaded wire rope (Tr. 173). Ratliff did not believe that the defect significantly affected the safety of the winch (Tr. 173).

The record establishes that there had been no thorough inspection of the cited winch/chugger since 1995. Under no circumstances can four years be considered a regular interval. The winch was not inspected in accordance with manufacturer's specifications. This portion of the citation has been established.

Operator did not understand the proper methods for hitching loads. The Parts Bulletin requires that the winch operator "must thoroughly understand proper methods of hitching loads" (Exh. C-12, p. 1). Complainant introduced no evidence regarding Jagodzinski's, understanding of proper hoisting techniques. Complainant relies entirely on Jagodzinski's knowledge that a single sling was being used to hoist the I-joists on December 22 (Complainant's Post-hearing Brief, p. 24).

As discussed above, Complainant failed to show, by a preponderance of the evidence, that use of a single choker hitch constituted a recognized hazard. Therefore, Jagodzinski's failure to recognize that the use of the single choker was hazardous cannot, in itself, establish that Jagodzinski did not understand proper methods for hitching loads. In the absence of any other evidence of Jagodzinski's knowledge, this portion of the citation cannot be sustained.

Loads were carried over people. The winch's operating instructions state, *inter alia*, "4. Always stand clear of the load", and "6. Never carry loads over people" (Tr. 133; Exh. C-12, p.2).

Jagodzinski testified that he thought Mike Ready was standing outside the chugger bay as he signaled him (Tr. 261). Marunde testified that neither he nor Ready were standing directly under the suspended load during their conversation (Tr. 238). Hibler, who walked by the chugger bay during the lift, also testified that Ready was not standing directly under the load when he glanced over (Tr. 304-05).

CO Ratliff testified, however, that piping in the chugger bay partially obscures the chugger operator's view of the ground floor (Tr. 54; Exh. C-29, C-30). According to CO Ratliff, Mike Ready had to stand in the zone of danger beneath the chugger's load in order to be seen by Mr. Jagodzinski

(Tr. 54-55; Exh. C-29, C-30). United Goedecke workers told Ratliff that they observed Ready working under the suspended load (Tr. 53-54). Ratliff's accident investigation showed that Ready was struck, in the chugger bay, by a downward blow from the truss (Tr. 50, 54; Exh. C-26, C-27). Jagodzinski admitted that Ready was found in the chugger bay after he was struck (Tr. 261, 276).

CO Ratliff also testified that Jagodzinski was exposed to the danger of falling loads while operating the chugger (Tr. 56-57). The chugger platform extends into the chugger bay itself; there is no barrier or shield above the operator to protect him from falling loads (Tr. 57; Exh. R-9). Jagodzinski stated that there were a "couple of pipes" above his head in the chugger bay, but admitted that the pipes would not completely prevent a load falling down the chugger bay from striking him (Tr. 275, 278).

Both William Hibler and Michael Marunde, supervisory personnel with Midwest, were aware of the hoisting operation in the chugger bay. The record establishes that because of the nature of the December 22 operation, it was foreseeable that Mike Ready would step out into the bay to be seen signaling and that Ready would be standing under the load at some point. The evidence shows that Ready was, in fact, standing under the load when a joist fell, striking and killing him.

This judge finds that Midwest should, with the exercise of reasonable diligence, have been aware that Ready was, or would likely be standing in the zone of danger under the suspended chugger load while performing his assigned duties. The Secretary established the cited violation.

Willful

During the March 7, 2001 hearing, the willful characterization of this violation was stricken (Tr. 342). Complainant moved for reconsideration of the dismissal, and the motion was granted. Having reconsidered the matter, this judge finds that the Secretary did not prove that the cited violations were willful.

The Commission has defined a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶30,759, p. 42,740 (No. 93-239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1996). Under Commission precedent, it is not enough for the Secretary to show that an employer was aware of the conduct or conditions that constitute the alleged violation; such evidence is already necessary to establish any violation. The Secretary must differentiate a willful violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Propellex*

Corporation (Propellex), 18 BNA OSHD 1677, 1999 CCH OSHD ¶31,792 (No. 96-0265, 1999), *citing, Hern Iron Works*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶30,046, p. 41,256-57 (No. 89-433, 1993).

In *Propellex,* the Commission noted that the Secretary must show that the employer was actually aware, at the time of the violative act, that the violative conduct or condition was unlawful, or that it possessed a state of mind such that if it were informed of the unlawful nature of the conduct, it would not care, citing *Johnson Controls*, 16 BNA OSHC 1048,1051, 1993-95 CCH OSHD ¶30,018, p. 41,142 (No. 90-2179, 1993). The Commission went on to provide examples of an employer's heightened awareness, listing cases where an employer was previously cited for violations of the standards in question, or was otherwise made aware of the requirements of the standards, and so was actually on notice that violative conditions existed. *Propellex, supra.*

As a threshold matter, this judge notes that Midwest was shown only to have constructive, rather than actual, knowledge of the cited violation(s).

Winch had not been inspected prior to being used. As noted, Midwest admits that Hibler failed to set up a regular inspection schedule for the winch as is required in the bulletin (Tr. 145; Complainant's brief, p. 22-26). The record establishes that Hibler should have been aware of the violation, in that he was somewhat familiar with the Parts Bulletin, and had read it back in 1995 when he sent the winch out for repairs (Tr. 145).

Hibler may have been careless in his reading of the manual's requirements, and in his failure to formulate a regular, documented inspection plan for the winch; however, this judge cannot find that a single reading of the bulletin gave Hibler a "heightened awareness" of his responsibilities in regard to the winch. There is no reason to believe Hibler knew that his failure to follow the directives contained in the Parts Bulletin constituted an OSHA violation. Moreover there is no reason to believe that if he had known, he would not have cared. At no point did Hibler indicate that he considered, but rejected the idea of scheduling periodic inspections. There is there no evidence that Hibler recognized that his failure to adhere to the specifics of the Parts Bulletin would endanger employee safety, but did not care. CO Ratliff admitted that the condition of the winch was not hazardous, despite the absence of regular inspections. The facts do not establish either Hibler's heightened awareness of the illegality of his actions, or his indifference to employee safety.

Loads were carried over people. Complainant did not introduce any evidence showing that Midwest's supervisory personnel actually knew that Ready was or would be working under loads being

hoisted. It was not shown that either Marunde nor Hibler intended for Ready to stand under the load (Tr. 239, 303). Complainant established only Midwest's constructive knowledge of this violation.

To establish willfulness, Complainant relies solely on Hibler's failure to provide the winch operators with a copy of Ingersol Rand's Parts Bulletin. Hibler's failure to provide the bulletin in this case had no repercussions. Midwest's safety handbook also prohibits standing under loads (Tr. 182; Exh. C-19, p. 63). Each of Midwest's employees had a copy of the handbook (Tr. 182). Jagodzinski testified that he knew that both he and Mr. Ready knew that they should not stand underneath the winch load (Tr. 266-67).

Because Midwest already had a rule prohibiting the cited conduct, and because the Secretary failed to establish that Midwest had any actual knowledge that the cited employee was violating the work rule, this judge cannot find that Midwest had a heightened awareness of the violative conditions, or was indifferent to employee safety.

Penalty

A penalty of $63,000.00 was proposed, based on this item's willful characterization. OSHA's normal procedure is to multiply the gravity based penalty by a factor of ten for a willful violation. This would indicate that the gravity based penalty for this item was $6,300.00. Since the violation was deemed willful, no credit was given for good faith.

The cited violation was shown to be serious in nature. Because Mr. Ready's death was attributable to his position under the winch's load, the gravity of the violation was high. This judge finds that credit for good faith should be accorded, inasmuch as Midwest had owned the facility for only seven days prior to the accident, and had no opportunity to familiarize itself with ComEd's safety program, or to update employee training.

Taking into account the relevant factors, this judge finds that a penalty of $5,000.00 is appropriate.

Alleged Violation of §1910.1001 *et seq.*

Other than serious citation 3, item 1 alleges:

29 CFR 1910.1001(j)(2)(i): Building and facility owners did not determine the presence, location, and quantity of asbestos-containing material (ACM) and/or presumed asbestos containing material (PACM) at the work site:

> a. On or about December 22, 1999, on the second floor at the chugger (or winch) operating platform between the boilers, material that contained 10% asbestos was on the floor, and the employer had not determined the location and quantities of ACM at the work site.

Other than serious citation 3, item 2 alleges:

29 CFR 1910.1001(j)(4)(i): Warning labels were not affixed to all raw materials, mixtures, scrap, waste, debris, and other products containing asbestos, tremolite, anthophyllite, or actinolite fibers, or to their containers:

> a. On or about December 22, 1999, on the second floor at the chugger (or winch) operating platform between the boilers, material on the platform Door contained 10% asbestos and a warning label was not affixed to it.

Other than serious citation 3, item 3 alleges:

29 CFR 1910.1001(k)(1): All surfaces were not maintained as free as practicable of accumulations of dusts and waste containing asbestos, tremolite, anthophyllite, or actinolite:

> a. On or about December 22, 1999, on the second floor at the chugger (winch) operating platform between the boilers, material contained 10% asbestos was on the floor of the platform.

Facts

CO Ratliff testified that, during the course of his investigation, he noticed a single piece of insulation in plain view on the chugger platform (Tr. 147-48). Michael Marunde confirmed that Midwest was engaged in insulation clean-up on December 22, 1999 (Tr. 227). Moreover, Midwest stipulated that, upon testing, the insulation was found to contain 10% asbestos (Tr. 26, 146).

Ratliff admitted, however, that he did not know where the piece of insulation came from, how long it had been on the chugger platform, and was unable to determine whether Midwest could, with the exercise of reasonable diligence, have known of the presence of this material on the second floor (Tr. 152, 155). Marunde was involved in cleaning up bales of old asbestos insulation on the 6th through the 9th or 10th floors in the 81-82 boiler area (Tr. 227, 250-51).

After removing a sample, Ratliff left the insulation on the chugger platform; he admitted he did not know how the remainder of the insulation was eventually disposed of (Tr. 156).

Discussion

Other than serious citation 3, item 1: Section 1910.1001(j)(2)(i) provides:

> Building and facility owners shall determine the presence, location, and quantity of ACM and/or PACM at the work site. Employers and building and facility owners shall exercise due diligence in complying with these requirements to inform employers and employees about the presence and location of ACM and PACM.

The record establishes: 1) that asbestos clean up was taking place in the 81-82 boiler area on December 22; and 2) that during CO Ratliff's inspection of the second floor chugger platform at 71-72

boiler area, he found a single piece of insulation. The record is devoid of any evidence that Midwest failed to exercise due diligence in determining the presence, location and quantity of ACM and or PACM at the Joliet plant. Complainant introduced no evidence about Midwest's asbestos removal plan, or how it was implemented. The CO had no idea how the single piece of asbestos insulation came to be so far from the clean-up area. This judge cannot find, from the bare fact that asbestos containing insulation was being removed from other areas of the plant, that Midwest should have been alert to the possibility of a single piece of asbestos insulation turning up on the second floor chugger platform. The CO himself admitted he did not know how long the insulation had been on the platform, and could not determine whether, with the exercise of due diligence, Midwest could have known of the presence of the material.

In its brief, Complainant reiterates the Secretary's belief that "a demonstration of actual or constructive employer knowledge is not properly an element of her *prima facie* case." The Secretary's position would impose strict liability on employers, and has long been rejected. It is well established Commission precedent that in order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that the cited employer either knew or could have known of the cited condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p.39,157 (No. 87-1359, 1991). Because Complainant failed to show that Midwest had either actual or constructive knowledge of the presence of the AMC on the chugger platform, this item is vacated.

Other than serious citation 3, item 2: Section 1910.1001(j)(4)(i) provides:

> Warning labels shall be affixed to all raw materials, mixtures, scrap, waste, debris, and other products containing asbestos fibers or to their contains. . ..

Other than serious citation 3, item 3: Section 1910.1001(k)(1) provides:

> All surfaces shall be maintained as free as practicable of ACM waste and debris and accompanying dust.

For the reasons set forth under item 1 above, other than serious citation 3, items 2 and 3 are also vacated.

ORDER

1. Serious citation 1, items 1, 2 and 3 alleging violations of §§1926.251(a)(6), (e)(1)(ii), and (e)(8)(iii) are AFFIRMED and a combined penalty of $100.00 is ASSESSED.

2. Willful citation 2, item 1 is VACATED.

3. Citation 2, item 2 is AFFIRMED as a "serious" violation of the Act, and a penalty of $5,000.00 is ASSESSED.

4. Other than serious citation 3, items 1, 2 and 3 are VACATED.

/s/
James H. Barkley
Judge, OSHRC

Dated: June 5, 2001